SUPREME COURT, U.S.

OCT 22 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 677

ELFRIEDE BERTA POFROWSKI,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

ROBERT GERARD TARDIF, ESQ.
Counsel for Petitioner
2195 S.W. 19th Terrace
Miami, Florida 33145
Area Code 305-443-6611

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IN THE

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ELFRIEDE BERTA POPROWSKI,
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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered and rendered in the above-entitled case on May 21, 1968 to which a petition for rehearing was denied on June 26, 1968.

CITATIONS TO OPINIONS BELOW

The decision of the Special Inquiry Officer in and for the United States Department of Justice of the Immigration and Naturalization Service, File No. A13 362 436

(Miami, Florida) dated June 9, 1967, is unreported, appears in the Record at Pages 12 through 24 and is printed in Appendix A hereto.

The opinion of the United States Department of Justice, Board of Immigration Appeals, dated August 22, 1967, wherein the appeal was dismissed, appears in the Record at Pages 2 through 6 and is printed in Appendix B hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit dated May 21, 1968, case No. 25177, appears in the record at Page 307, and is reported in 394 F.2d 987, and is printed in Appendix C hereto, which also includes Judgment, Page 308, and Order Denying Rehearing, Page 314 of the Record.

JURISDICTION

The jurisdiction of this Court is invoked because this matter involves the interpretation of Sections of the Immigration and Nationality Act with respect to an application for adjustment of petitioner's status from that of a temporary visitor to permanent resident, pursuant to the provisions of 8 U.S.C. §1105(a), and Section 245 of the Immigration & Naturalization Act and an abuse of discretion in the adjusting of her status, so as to make deportation unnecessary, and is, therefore, a matter of such importance that it justifies the exercise of the discretionary certiorari power of this Court.

QUESTION INVOLVED

Whether the United States Circuit Court of Appeals for the Fifth Circuit erred in affirming the decision of the United States Department of Justice, Board of Immi-

gration Appeals, which affirmed the Order of the Special Inquiry Officer, who denied adjustment of status to that of permanent resident because:

1. She was not afforded sufficient opportunity to secure the Labor Certificate, and

2. The criminal record relied upon by the Hearing Officer and the Board of Immigration Appeals did not render her ineligible under 8 USC §1182(a)(9).

That in respects to the said criminal record whether conviction of a municipal ordinance is a crime within the meaning of Section 241(a)4 and Section 212(a)(9) of the Immigration & Nationality Act, and also whether there is a provision for pardon for such offenses and whether a suspended sentence &/or probation negates such application of this statute.

STATEMENT OF THE CASE

This is a petition brought under the provisions of 8 USC Sec. 1105(a) to review a final order of deportation entered by a Special Inquiry Officer of the Immigration and Naturalization Service. An appeal from that order was dismissed by the Board of Immigration Appeals which affirmed the Order of the Special Inquiry Officer.

The Petitioner made application for an adjustment of status under Section 245 of the Immigration and Nationality Act. The Special Inquiry Officer found Petitioner statutorily ineligible for adjustment of status under Section 245 of the Act because:

1. She did not have the required Labor Certificate, 8 U.S.C. 1182§(a)(14) of the Act, and,

2. She has a disqualifying criminal record, 8 U.S.C. §1182(a)(9).

Actually this was a petition brought under the provisions of 8 U.S.C. §1105(a) to review the Final Order of Deportation entered by the Special Inquiry Officer of the Immigration and Naturalization Service. Your Petitioner admits that she is deportable, but contends that she was erroneously denied an adjustment of status to that of permanent resident, pursuant to the provisions of 8 U.S.C. §1255(a)(1), **Section 245 of the Immigration and Nationality Act.** Under that provision, that status of an otherwise deportable alien such as Mrs. Poprowski

> "may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to her at the time her application is approved."

Mrs. Poprowski made due and proper application for adjustment of her status pursuant to this section, and the non-preference quota from Germany had not been filled. The Board held that Mrs. Poprowski was disqualified because of a conviction in Bonn, Germany, on August 24, 1962 for "fraudulent embezzlement", for which she was

given a suspended sentence of nine months in prison;[1] and two convictions for petty theft in the Miami, Florida, Municipal Court, for the theft of a $36.00 dress and a container of Maxwell House Coffee of the value of $0.89, after her entry into the United States. These latter two convictions were on March 16, 1965 and July 27, 1966. These "convictions" do not, contrary to the holding of the Board of Immigration Appeals and the Fifth Circuit Court of Appeals, render the petitioner ineligible for admission into the United States under 8 U.S.C. §1182(a)(9). That subsection excludes:

> "aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense) . . . Any alien who would be excludable because of the convictions of a misdemeanor classifiable as a petty offense under the provisions of 18 U.S.C. §1(3), by reason of the punishment actually imposed, or who would be excludable as one who admits the commission of an offense that is classifiable as a misdemeanor under the provisions of 18 U.S.C. §1(2), by reason of the punishment which might have been imposed upon him, may be granted a visa and admitted to the United States if otherwise admissible; Provided, That the alien has com-

[1] In any event, the "nine months" prison sentence was never, in fact, actually imposed upon or served by the petitioner. (The Special Inquiry Officer relied also upon alleged "convictions" of the petitioner in Germany in 1942 and 1950 (See Record, Page 235), but here again the proof of these "convictions" was extremely uncertain and, indeed, the later order of the German Court suspending the petitioner's sentence for the 1962 offense stated that they "do not carry much weight" (Record, 259). These prior offenses were not at all considered or relied upon by the Board of Immigration Appeals and/or the Court of Appeals, which appear to have based their decisions solely on the 1962 conviction and the City of Miami offenses.

> mitted only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense."

The City of Miami "convictions" are not within the terms of this subsection at all. This is so because the subsection requires that the alien have been convicted of a "crime . . . " It is established Florida law that violations of municipal ordinances, such as those punished in this case by convictions in the City of Miami Municipal Court, are not "crimes" but mere "offenses". As the Supreme Court of Florida held in **Roe v. State, 96 Fla. 723, 119 So. 118, 121:**

> "It appears that the weight of authority is quite well settled to the effect that, in order for a conviction of crime to be admissible as affecting the credibility of a witness, it must be a conviction of an offense against 'the law of the land"; that no offense is a crime, as used in this sense, which does not violate the law of the land; and it is well established that a conviction for a violation of a municipal ordinance does not come within this category and is not admissible as affecting the credibility of a witness."

> "If offenses against municipal ordinances, which are purely local in their territorial operation and effect, should be held to constitute crimes, there would be no uniformity in the criminal laws of the state, and the intent of the constitutional provision would be defeated. But as offenses against municipal ordinances providing penalties for certain acts in violation thereof are neither crimes

> nor misdemeanors, strictly speaking, within the meaning of the constitutional provision, or of **Section 2706, Rev. Gen. Stats. (Florida)**, convictions for the same are not admissible as affecting the credibility of witnesses."

And in Accord: **Hendrick v. Strazzulla, 135 So.2d 1.**

Neither does the 1962 conviction preclude eligibility. This is so because it clearly comes within the proviso of subsection 9 which precludes the consideration of a single "conviction" of a "misdemeanor classifiable as a petty offense under the provisions of **Section 1(3) of 18 U.S.C.**, by reason of punishment actually imposed..." 18 U.S.C. §1(3) provides that:

> "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500. or both, is a petty offense."

Here, there was no penalty actually imposed upon the petitioner as a result of the 1962 conviction. She was given a nine months suspended sentence, subject to a five year period of probation. It seems quite clear, therefore, that the 1962 conviction was, in fact, a "petty offense" under both 18 U.S.C. §1(3) and the exclusionary provisions of 8 U.S.C. §1182(9). Therefore, subsection 9 was erroneously applied to bar, as a matter of law, the application of readjustment of status under 8 U.S.C. §1255(a).

DECISION IN THE COURT BELOW

The United States Court of Appeals for the Fifth Circuit, Per Curiam, before Pope, *Tuttle and Clayton, Circuit Judges, denied the Petition stating: "This petition to review a final order of deportation entered by a special inquiry officer and affirmed by the Board of Immigration Appeals presents no basis for the court's interference with the order." That On Petition For Rehearing, before the same, Pope, *Tuttle and Clayton, Circuit Judges, Per Curiam, the decision was, "It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED."

REASON FOR GRANTING THE WRIT

The Supreme Court of the United States should find the petitioner does qualify under 8 USC §1255(a)(2) and that, therefore, the Attorney General is within his discretion to adjust her status, and allowing administrative grace.

In affirming the decision of the Board of Immigration Appeals, the United States Court of Appeals For The Fifth Circuit apparently accepted the position that the petitioner was statutorily unqualified for readjustment of status as a permanent resident, under 8 U.S.C. §1255(a), on the grounds of her ineligibility for such readjustment under 8 U.S.C. §1182(a)(9), and the Court overlooked and failed to consider the fact that the terms of the latter provision do not, contrary to the holding of the Board of Immigration Appeals, render her so ineligible. Her 1962

*Of the Ninth Circuit, sitting by designation.

German conviction for "embezzlement" was not accompanied by a penalty of imposition and thus constituted "a misdemeanor classifiable as a petty offence under the provisions of 18 U.S.C. §1(3), by reason of punishment actually imposed..."

Her violations of City of Miami, Florida, ordinances, do not constitute "crimes" under the law of Florida and within the meaning of 8 U.S.C. §1182(a)(9). Since the basis of the decision of the Board of Immigration Appeals was apparently solely the holding of ineligibility under 8 U.S.C. §1182(a)(9), this decision should be reversed.

As this case involves the question as to whether the convictions of a municipal ordinance is a crime within the meaning of Section 241(a)(4) and Section 212(a)(9) of the act, and also whether there is provision for pardon for such offenses. See Matter of C__R__, 8 I & N Dec. 59.

It would further appear that the Special Inquiry Officer based his determination in part upon the holding that petitioner had failed to procure the labor certificate required under 8 U.S.C. §1182(a)(14). The issue was mentioned in the decision of the Board of Immigration Appeals, but apparently did not form a basis for its independent determination.

If the opinion of the United States Court of Appeals was based in part upon that issue, the Court has overlooked or failed to consider the fact that there was a consistent misunderstanding by the petitioner, who was for a long period unrepresented by counsel, of the requirements for securing the labor certificate involved. By the

time that counsel attempted to make application directly to the Justice Department, pursuant to **Title 29, part 60, Code of Federal Regulations,** it became impossible to secure the proper records from Germany, within the period required.

Since the petitioner is otherwise admissible to the United States, it is submitted that a reasonable discretion by the Bureau would require the granting of additional time to secure the labor certificate and to show a change in circumstances, which would prevent deportation on this technical basis.

It is respectfully submitted that in this case the Supreme Court of the United States has the right to grant the petition for certiorari so that the Attorney General may exercise discretionary relief to the petitioner, Elfriede Berta Poprowski, so that she will not suffer persecution if deported to her native West Germany.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the judgment of the United States Court of Appeals for the Fifth Circuit **should be vacated and the cause forthwith** remanded to the Board of Immigration Appeals for further discretionary consideration.

Respectfully submitted,

ROBERT GERARD TARDIF, ESQ.
Attorney for Petitioner
2195 S.W. 19th Terrace
Miami, Florida 33145

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to the Solicitor General, United States Department of Justice, Washington, D.C., this _____ day of October, 1968.

Robert Gerard Tardif, Esquire
Counsel for Petitioner

APPENDIX "A"

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. _____

APPENDIX "A"

Decision of the Special Inquiry Officer
UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
June 9, 1967

Files: A13 362 436—Miami, Florida
A13 327 406

In The Matters of
ELFRIEDE BERTA POPROWSKI, and
ROLF POPROWSKI

Respondents.

IN DEPORTATION PROCEEDINGS

CHARGE:

I & N Act—Section 241(a)(2) Nonimmigrant—Remained longer.

APPLICATIONS: Adjustment of status to permanent resident under Section 245; or

Voluntary departure in lieu of deportation; or

Withholding of deportation under Section 243(h).

IN BEHALF OF SERVICE:
Joseph W. Monsanto
Trial Attorney
and
Henry J. Scroope, Jr.
Trial Attorney
Miami, Florida

IN BEHALF OF
RESPONDENTS:
James R. Sabatino, Esq.
900 Southwest 2 Avenue
Miami, Florida 33130

DECISION OF THE SPECIAL INQUIRY CFFICER

This record relates to a 43-year old divorced female and her 14-year old male child, natives and citizens of Germany. Both were admitted to the United States as temporary visitors for pleasure on November 12, 1964. The child's status was later changed to student and both were authorized to remain in the United States until March 15, 1966. It is alleged in the Orders to Show Cause that they have remained since the latter date without permission. These factual allegations were admitted at the hearing, as well as the charge in the Orders to Show Cause of remaining longer than permitted under the law. Deportation is therefore not an issue in this matter.

Respondents submitted applications to adjust status to permanent residents under Section 245 of the Act. The latest bulletin from the Department of State shows that preference and nonpreference immigrant visa numbers are available for natives of Germany. The eligibility of the female for Section 245 adjustment is first considered.

The adult female respondent has no close relatives who are residents or United States citizens and she has no preference within the quota. She has stated that she would be required to work to maintain herself if permitted to reside in the United States and not being otherwise exempt she is therefore required to submit a labor certification as required by Section 212(a)(14) of the Act. Advice as to this requirement was given to her at the original hearing on June 30, 1966, and at several of the continued hearings. The certification has not been forthcoming and in the absence of same it is necessary to conclude that she is statutorily ineligible for admission to the United States as required by Section 245 of the Act. (**Matter of N——**, Int. Dec. 1666; cf. **Matter of V——H——**, Int. Dec. 1635).

The adult female respondent is also ineligible as a matter of law to adjust status under Section 245 of the Act because she is ineligible for admission to the United States under Section 212(a)(9) by reason of her criminal record and she is not eligible to apply for waiver of this ineligibility. On March 12, 1965, she was convicted by the Municipal Court, Miami, Florida, for petty theft (Exhibit #17); and in the same Court on July 22, 1966, she was convicted for the same offense (Exhibit #6). While another matter is presently under consideration locally as to whether conviction of a Municipal Ordinance is a crime within the meaning of Section 241(a)(4) and Section 212(a)(9) of the Act, and also whether there is provision for pardon for such offenses, the present interpretation is that such offenses are crimes within the meaning of the statutes, (**Matter of C—— R——**, 8 I&N Dec. 59). She would therefore be inadmissible to the United States under the provisions of Section 212(a)(9) because of the conviction of these two petty offenses.

In addition there was accepted into the record authenticated copies of the records, with translations, relating to charges placed against the adult female respondent in Germany. Exhibits Numbers 14, 10, 12, and 13 relate in sequence to records of court proceedings instituted against her in Bonn, Germany, in 1961 for swindling, for attempting to swindle by false financial dealings and attempt to subordinate perjury of a witness. In the Court decree (Exhibit #10) the Court discussed the grounds for the several charges and found her guilty of only the one charge of systematic fraud. As to this charge the Court made the following findings:

> "In so doing the Defendant committed a systematic act, moved by an intention of gaining an unlawful financial advantage, in which the interests of others were hurt in that they have been lead into an error by presentation of false facts. She is therefore subject to a penalty for fraud in accordance with Par. 263 Sec. I of the Penal Code". (Exhibit 10, page 5).

The Court in final decree of August 24, 1962, (Exhibit 12) sentenced the defendant (respondent) to nine months prison and suspended the sentence. On October 27, 1964, order to serve this sentence was issued by the State Attorney in Bonn, Germany, which order to serve sentence was presumably not served on the respondent prior to her departure for the United States.

Transcript of Sections 23 and 263 of the German Penal Code, under which respondent was found guilty and granted suspended sentence, are included in the record (Appendix Number 1). The German Statutes thereby de-

fine fraud as a crime (cf. **Matter of R——**, 1 I&N Dec. 118), and considering this definition and the facts involved as established by the court records it is concluded that the adult female respondent was convicted of a crime involving moral turpitude, the same basically encompassing the crime of embezzlement. She stated that an appeal was taken to this conviction and the Extract from the Penal Register (Exhibit Number 8) reflects that an appeal was entered on August 21, 1964. Respondent does not know the action taken on the appeal and the record does not reflect this action. However, the fact that she has been ordered to serve sentence would indicate the appeal was unsuccessful.

In addition the respondent has not presented any evidence to the contrary to show that the appeal is still pending and this would be her obligation to do so. It is concluded therefore that she was convicted in Germany by final decree of August 24, 1962, of a crime involving moral turpitude and by reason thereof is also inadmissible to the United States under Section 212(a)(9) of the Act.

The Extract from the Penal Register in Bonn, Germany, (Exhibit Number 8) reflects additional convictions of the respondent—On July 21, 1942, for th ft with sentence of 6 months in prison, and October 27, 1950, for fraud and theft with sentence of 2 weeks and 5 days in prison. She admitted these convictions at the hearing and stated that she served part of each sentence. As reflected by the Extract she stated that she was pardoned (by amnesty) of the July 21, 1942 conviction. However, this foreign pardon would not remove any inadmissibility by reason of this conviction (**Matter of B——**, 7 I&N Dec. 166). The adult female respondent therefore appears inadmissible

under Section 212(a)(9) of the Act because of these two additional convictions.

The record also contains a copy of a complaint filed against this respondent in Bonn, Germany, on August 31, 1964 for embezzlement or fraud (Exhibit Number 9) which was referred for hearing before the Jury Court on October 12, 1964 (Exhibit Number 11). According to the Extract from the Penal Record (Exhibit Number 8) she is wanted by the State Attorney in Bonn for fraud, possibly to stand trial on the above proceedings. The U. S. Department of State in letter of September 15, 1965, advised that there was then a warrent outstanding for her arrest (Exhibit Number 15).

The record contains copy of divorce decree obtained by the female adult respondent in Miami, Florida, on June 14, 1965 (Exhibit 16-A). Relative to that action the Trial Attorney offered and there was accepted in evidence copy of interrogatories propounded to her and her sworn answer thereto. Among others reference was made to questions 5 of her interrogatory as to whether she had been convicted of a crime prior to her marriage; question 6 as to whether she had any such conviction subsequent to marriage; question 7 as to whether she was under indictment for any offense, and question 8 as to whether she was wanted by the German authorities. In her answer of March 12, 1965, she answered questions 5, 7, and 8 in the negative and in response to question 6 stated that she was arrested in November or December 1964 in Miami Beach for nonpayment of hotel bill. While she claims and may not have known that she was then wanted in Germany she was still well aware of the crimes for which she then stood convicted.

Based on the foregoing it is concluded that the adult female respondent's application for adjustment of status must be denied as a matter of law because she is inadmissible to the United States under Section 212(a)(9) of the Act for conviction of crimes involving moral turpitude for which she is not eligible for waiver. She is also statutorily ineligible for adjustment because she has not presented a labor certification and is therefore inadmissible under Section 212(a)(14) of the Act, not being exempt from such certification. Additionally, her application does not warrant favorable consideration as a matter of discretion. While good character is not a requirement for adjustment under Section 245, it may be considered in determining whether discretion should be exercised in a given case (**Matter of F——**, 10 I&N Dec. 168) Certainly her past and present record is not favorable to her in this respect. There are no appealing or equitable factors in her favor. She has no close relatives in this country. Therefore, based on these considerations and the record as a whole her application to adjust status under Section 245 will also be denied as matter of discretion.

The adult female respondent, through the divorce proceedings, was granted custody of her son, the child respondent. In view thereof and the fact that his status is dependent on hers, his application for adjustment is also denied as a discretionary matter.

In the event the respondents are required to depart the United States, request was made that they be permitted to depart voluntarily in lieu of deportation. The Trial Attorney stated that the Service is opposed to the adult female respondent's request for voluntary departure as a matter of law and as a matter of discretion; as a

matter of law because she has not behaved as a person of good character for the past five years as required by Section 244(e) of the Act. Certainly the two offenses of petty theft for which she was convicted in 1965 and 1966 establish lack of good character. This is true whether or not they be considered as convictions of crime within the provisions of Section 212(a)(9) of the Act. Section 101(f) of the Act does not limit or preclude a finding of bad character for other reasons. Therefore in view of these convictions, the one in Germany in August 1962 and the present pendency of an action in that country, it is concluded that the adult female respondent is statutorily ineligible for voluntary departure in lieu of deportation in that she is unable to establish a good moral character for the previous five years. In view of these facts and the record as a whole it is also concluded that she is not entitled to this relief as a matter of discretion.

The Service does not oppose the application for voluntary departure for the child respondent. There is no reason to otherwise deny this relief to him and it could be permitted even though the mother is deported. His application will therefore be granted.

The adult female respondent selected Spain as the country for deportation if such action became necessary. It was then directed that if Spain would not accept, deportation be effected to Germany the place of birth, citizenship, and last place of residence. Application to withhold deportation to the latter country as provided by Section 243(h) of the Act was therefore submitted by the adult female respondent, alleging fear of persecution because of political opinion.

At the hearing on the application to withhold deportation the female respondent stated that she and her family were opposed to the nazi regime in Germany, that her father was placed in concentration camp and that she was required to perform forced labor. It was her further statement that some officials now in office in Germany were former nazis and because of her opposition to that regime she would not now be given fair consideration if returned to Germany. She referred particularly to the Judge who heard her criminal case in 1962. However upon further interrogation by the Trial Attorney she admitted that she would not be persecuted by reason of her race, religion, or political opinion. Her fear of returning was apparently due to the possibility of imprisonment and pending criminal charges. She stated that since her arrival in the United States she has been advised by her family that the officials in Germany were looking for her for reasons unknown. Governmental action taken in an orderly judicial manner to determine responsibility or guilt for ordinary crimes is not considered persecution within the meaning of Section 243(h) of the Act (**Matter of T—— T——**, 10 I&N Dec. 345). Her application to withhold deportation is without merit and will be denied.

ORDER: IT IS ORDERED that the respondents' applications for adjustment of status under the provisions of Section 245 of the Immigration and Nationality Act be denied.

IT IS FURTHER ORDERED that the application of the adult female respondent, Elfriede Berta Poprowski, for voluntary departure in lieu of deportation be denied.

IT IS FURTHER ORDERED that the adult female, Elfriede Berta Poprowski, be deported to Spain on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that in lieu of an order of deportation the child respondent, Rolf Poprowski, be granted voluntary departure without expense to the government within such time and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the child respondent, Rolf Poprowski, fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States to Spain on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country of Spain advises the Attorney General that it is unwilling to accept the respondents into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondents into its territory the respondents be deported to Germany.

IT IS FURTHER ORDERED that the respondent's applications to withhold deportation to Germany pursuant to Section 243(h) of the Act be denied.

Eugene E. Cole
Special Inquiry Officer

APPENDIX "B"

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

AUG. 22, 1967

Files: A-13362436—Miami
A-13327406

In re: ELFRIEDE BERTA POPROWSKI and ROLF POPROWSKI

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:

James R. Sabatino, Esq.
817 City Natl Bank Bldg.
25 West Flagler
Miami, Florida 33130

CHARGES:
Order: Section 241(a)(2), I&N Act (8 USC 1251 (a)(2) - Nonimmigrant - remained longer
Lodged: None

APPLICATION: Adjustment of status to permanent resident under Section 245; voluntary departure in lieu of deportation or withholding of deportation under Section 243(h)

The respondents, a mother and son, natives and citizens of Germany, appeal from an order entered by the special inquiry officer on June 9, 1967 directing the deportation of the adult female respondent to Spain and in the alternative to Germany on the charge contained in the Order to Show Cause and granting voluntary departure in lieu of deportation to her son. The applications of both respondents for adjustment of status under the provisions of Section 245 of the Immigration and Nationality Act were denied. The adult female respondent's application to withhold deportation to Germany pursuant to Section 243(h) of the Act was also denied. Deportability on the stated charges is conceded. The appeal is directed to the denial of relief under Sections 245 and 243(h) of the Immigration and Nationality Act (8 USC 1255 and 1253(h)).

The respondents last entered the United States through the port of New York on or about November 12, 1964. They were admitted as nonimmigrant visitors and thereafter authorized to remain in the United States until March 15, 1966. The male respondent's status was changed to that of a student subsequent to entry. The respondents have remained beyond March 15, 1966 and they concede that they are deportable as charged in their respective Orders to Show Cause.

The respondents have submitted applications to adjust their status to that of permanent resident aliens under Section 245 of the Immigration and Nationality Act. Both preference and nonpreference immigration visas were available for natives of Germany at the time of the hearing. The special inquiry officer found the adult female respondent statutorily ineligible for adjustment of status under Section 245 of the Act because (1) she does

not have the required labor certification as required by Section 212(a)(14) of the Act and (2) she is ineligible for admission to the United States under Section 212(a)(9) by reason of her criminal record. The application for the adjustment of the male respondent's status to that of a permanent resident alien was denied as a matter of discretion since his status as a minor followed that of his mother. The special inquiry officer also concluded that the female respondent's application for adjustment of status did not warrant favorable consideration as a matter of discretion.

Counsel on appeal maintains that the adult female respondent could qualify under Section 212(a)(14) of the Act if he had sufficient time to prosecute an application for a labor certification and submit the necessary proof of her past experience as a competent secretary. Counsel also maintains that the adult female respondent is admissible under Section 212(a)(9) of the Immigration and Nationality Act as her convictions are not for offenses which involve moral turpitude.

The evidence concerned with the issue of relief under Section 245 of the Immigration and Nationality Act has been fully discussed by the special inquiry officer in his opinion of June 9, 1967. The adult female respondent was convicted of petty theft by the Municipal Court of Miami, Florida on March 12, 1965 and again on July 22, 1966 (Exs. 17 and 6). The evidence also establishes that the adult female respondent was convicted in Bonn, Germany on August 24, 1962 of an offense comparable to fraudulent embezzlement (Exs. 14, 10, 12, 13). She was sentenced to nine months in prison, sentence suspended. However, an order to serve the sentence was issued by the state attorney at Bonn, Germany on October 27, 1964. There is a war-

rant outstanding for her arrest in Bonn, Germany pursuant to a complaint filed against her on August 31, 1964 for embezzlement or fraud (Exs. 9, 11, 15).

Counsel has submitted no authority to support his claim that the offenses for which the adult female respondent has been convicted do not involve moral turpitude. The crimes committed by the respondent were accompanied by an evil intent and a depraved motive. The courts have consistently held that both theft and fraudulent embezzlement involve moral turpitude. **United States ex rel. Rizzio v. Kenney,** 50 F.2d 418, D.C. Connecticut 1931; **United States ex rel. Schreiber v. Reimer,** 19 F.Supp. 719, 722 S.D. New York 1937.

The adult female respondent submitted an application to withhold deportation to Germany as provided by Section 243(h) of the Immigration and Nationality Act. She alleges fear of persecution because of her political opinion. She testified that she and her family were opposed to the Nazi regime in Germany; that her father was placed in a concentration camp and that she was required to perform forced labor under the Nazi regime. She maintains that the judge who heard her criminal case in 1962 is a former Nazi official and that she would not be given fair consideration if she returns to Germany.

The respondent's testimony establishes to our satisfaction that she fears imprisonment on pending criminal charges if she returns to Germany. She testified that since her arrival in the United States she has been advised by her family that the officials in Germany are looking for her for reasons unknown. Prosecution for criminal offenses by orderly judicial process is not considered persecution within the meaning of Section 243(h) of the Act **(Matter of T-T-,** 10 I&N Dec. 345).

The special inquiry officer concludes that the adult female respondent is statutorily ineligible for voluntary departure in lieu of deportation in that she is unable to establish good moral character for the previous five years. This conclusion is based upon the fact that the respondent was convicted of a crime involving moral turpitude in Germany in August of 1962; that a criminal action is now pending against her in Germany and the fact that she has been convicted on two occasions of petty theft while in the United States. The special inquiry officer also denied relief under Section 244(e) of the Act (voluntary departure) as a matter of administrative discretion. The record amply supports the special inquiry officer's conclusion and we affirm the denial of voluntary departure.

The adult female respondent obtained a divorce from the father of the minor male respondent at Miami, Florida on June 14, 1965 (Ex. 16-A). She was granted custody of her son, the minor male respondent. Under the circumstances, we affirm the special inquiry officer's denial of the minor male respondent's application for relief under Section 245 since his status is dependent upon the status of his mother.

The order entered by the special inquiry officer on June 9, 1967 is hereby affirmed. The appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

/s/ Thomas G. Finucane,
Chairman

APPENDIX "C-1"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25,177

ELFRIEDE BERTA POPROWSKI,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of Final Order of Deportation of the Immigration and Naturalization Service
(Florida case)

(May 21, 1968.)

Before POPE,* TUTTLE and CLAYTON, Circuit Judges.

PER CURIAM: This petition to review a final order of deportation entered by a special inquiry officer and affirmed by the Board of Immigration Appeals presents no basis for the court's interference with the order.

The Petition is DISMISSED.

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*Of the Ninth Circuit, sitting by designation.

APPENDIX "C-2"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25,177

ELFRIEDE BERTA POPROWSKI,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of Final Order of Deportation of the Immigration and Naturalization Service

Before POPE,* TUTTLE and CLAYTON, Circuit Judges.

JUDGMENT

This cause came to be heard on the petition of Elfriede Berta Poprowski, for review of an Order of the Immigration and Naturalization Service in Docket Nos.

*Of the Ninth Circuit, sitting by designation.

A-13-362-436 and A-13-327-406, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition in this cause be, and the same is hereby dismissed.

May 21, 1968

Issued as Mandate:

APPENDIX "C-3"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25,177

ELFRIEDE BERTA POPROWSKI,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of Final Order of Deportation of Immigration and Naturalization Service

(JUNE 26, 1968)

ON PETITION FOR REHEARING

Before POPE,* TUTTLE and CLAYTON, Circuit Judges.
PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

*Of the Ninth Circuit, sitting by designation.

APPENDIX "D"

UNITED STATES COURT OF APPEALS

Fifth Circuit

OFFICE OF THE CLERK

August 15, 1968

Edward W. Wadsworth
Clerk
Room 408-400 Royal St.
New Orleans, La. 70130
Tel. No. 527-6514

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Re: No. 25177—Elfriede Berta Poprowski -vs- Immigration & Naturalization Service

Gentlemen:

The following action has this day been taken in the above case:

( ) Motion to consolidate granted.

( ) Motion to supplement or correct record granted.

( ) Motion of ( ) for leave to file supplemental brief granted.

( ) Stipulation as to time for filing briefs has been granted.

( ) Motion for leave to file brief in excess of pages under Rule 28(g) F.R.A.P. granted.

( ) The Court's opinion has this day been rendered and a copy thereof is enclosed.

( ) Motion for leave to file petition for rehearing in excess of pages under Rule 40(b) F.R.A.P. granted.

XXX A stay of mandate has been granted to and including September 24, 1968.

( ) Order enclosed has been entered.

/jab
Mr. Robert Gerard Tardif
Mr. Charles Johnson
Miss Lavinia L. Redd

Very truly yours,

Edward W. Wadsworth, Clerk

By J. E. Windhorst, Jr.
Deputy Clerk

APPENDIX "E"

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No._____

ELFRIEDE BERTA POPROWSKI,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 21, 1968.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 30th day of September, 1968.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 677

ELFRIEDE BERTA POPROWSKI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a native and citizen of Germany, was admitted to the United States on or about November 12, 1964, as a nonimmigrant visitor, and was authorized to remain in the United States until March 15, 1966. When she remained beyond that date, the Immigration and Naturalization Service instituted a deportation proceeding. Petitioner conceded (and concedes here (Pet. 4)) that she is deportable but applied for an adjustment of status under the provisions of Section 245

of the Immigration and Nationality Act, 8 U.S.C. 1255.

Both the special inquiry officer and the Board of Immigration Appeals found petitioner to be ineligible for adjustment of status because (1) she did not have the labor certification which is required by Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14); and (2) she was ineligible for admission to the United States under Section 212(a)(9), 8 U.S.C. 1182(a)(9), because of her criminal record. (Pet. App. 1-15).

On petition for review, the Court of Appeals for the Fifth Circuit, finding no basis for interference with the deportation order, dismissed the petition *per curiam* (Pet. App. 16-18). A petition for rehearing was denied on June 26, 1968. (Pet. App. 19). On September 30, 1968, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 21, 1968. (Pet. App. 22). The petition, however, was not filed until October 22, 1968. It is thus out of time under 28 U.S.C. 2101(c) and Rule 22(3) of this Court, and cannot invoke the Court's certiorari jurisdiction. See, also, Stern and Gressman, *Supreme Court Practice* (3d Ed.), Sec. 6-1; Memorandum in Opposition (pp. 8-9) in *Morales et al.* v. *Immigration and Naturalization Service*, Nos. 77 Misc. and 78 Misc., this Term, certiorari denied, October 14, 1968.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied or dismissed.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 324680 306